U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: JAN 2 9 2013 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and computer consultancy business. It seeks to employ the beneficiary permanently in the United States as a senior business system analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not meet the job qualifications stated on the labor certification. Specifically, the director determined that the labor certification required at a minimum a bachelor's degree in engineering or computer science and five years of progressive post-baccalaureate experience. The director further determined that the petitioner submitted evidence to establish that the beneficiary was awarded a bachelor's degree equivalent but that the petitioner failed to demonstrate that the beneficiary meets the experience requirements of the position.

On appeal, counsel asserts that the beneficiary meets the minimum experience required for the position.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The petitioner has submitted evidence to show that the beneficiary possesses the foreign equivalent of a bachelor's degree in electronic engineering as of April 2004. The petitioner has also submitted employment letters pertaining to the beneficiary's work experience. The issue in this case is whether the beneficiary's degree and work experience constitute a U.S. advanced degree or a foreign degree equivalent.

As noted above, the DOL certified the ETA Form 9089 in this matter. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified, and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Evidence of qualifying experience shall be in the form of letters from former employers which include the name, address, and title of the writer and a specific description of the duties performed. If such evidence is unavailable, other documentation relating to the experience will be considered. 8 C.F.R. § 204.5(g)(1).

In this matter, Part H, line 4, of the labor certification reflects that a master's degree in engineering or computer science is required. The labor certification at Parts H, line 6; and H, line 10, also reflect that 12 months of experience in the duties of the proffered position or 12 months of experience as an IT analyst is required. As an alternative, the labor certification at Part H, line 8, requires a bachelor's degree in engineering or computer science and five years of progressive post-baccalaureate experience. Part H, line 9 reflects that a foreign educational equivalent is acceptable.

Part H, line 11, of the labor certification reflects the required job duties as:

- Plan and organize systems analysis and quality assurance/control activities. Review, analyze, and evaluate business systems and user needs to create functional specifications. Execute test scripts, log and track defects using Quality Center/Test Director. Test applications using HTML/DHTM, XML, Java, J2EE, JDK, and Microsoft applications. Execute SQL queries on Oracle and SQL environment. Perform Automated Regression and Performance Testing using QTP, Load Runner and WinRunner.

Part H, line 14, of the labor certification reflects the required specific skills or other requirements as:

- Will accept bachelor's degree or foreign equivalent in engineering or computer science and five (5) years of progressive work experience in lieu of a master's degree or foreign equivalent and one (1) year experience. Experience as an IT analyst is acceptable. Supervise two (2) consultants.

The beneficiary set forth her credentials on the labor certification and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's five years of work experience in the job offered, she represented the following:

- That she was employed by [redacted] as a "quality analyst" from October 4, 2010 to November 29, 2010. The beneficiary described her job duties.

- That she was employed by as an "I.T. Analyst" from August 29, 2004 to October 3, 2010. The beneficiary described her job duties.

The petitioner submitted the following evidence:

- A letter dated June 4, 2009 from , regional HR manager of , who stated that the beneficiary is an employee of the company and has been permanently employed by the company since July 29, 2004. The declarant further stated that the beneficiary was on a long-term assignment in the United States on an L1A Visa, and has been performing as an "assistant systems engineer" on a project for a client in the United States. The declarant does not describe the beneficiary's job duties.

- A joining letter dated June 30, 2004, from informing the beneficiary that her initial learning program (training) at the company will begin on July 29, 2004, and will continue for 46 working days. The letter further indicated that the beneficiary's learning will be followed by possible on-the-job training.

- An affidavit from who stated that he was employed by from November 29, 2000 to January 31, 2008 as a project manager. He further stated that the beneficiary was employed as an "I.T. analyst" from August 29, 2004 to January 31, 2008, and that he was responsible for her supervision. The affiant described the beneficiary's job duties.

- An affidavit from , who stated that he was employed by as a project lead from June 26, 2006 to July 27, 2011, the date he signed the affidavit. He further stated that the beneficiary was employed as an "I.T. analyst" from February 1, 2008 to October 3, 2010, and that the affiant was the beneficiary's supervisor. The affiant described the beneficiary's job duties.

- A copy of a pay slip from generated on October 15, 2010 and bearing the beneficiary's name as employee.

- A copy of a pay stub from dated September 23, 2010 and bearing the beneficiary's name as employee.

- A copy of a Hats Off Award issued by to the beneficiary and dated August 2007, in recognition of the beneficiary's three (3) years of dedicated service.

- A copy of a full and final settlement from which identified the beneficiary's position as I.T. analyst and which indicated the beneficiary's date of joining (July 29, 2004) and date of relieving (October 16, 2010) the statement shows the beneficiary's earnings in Indian rupees.

The petitioner submitted on appeal a service certificate that was signed by the senior general manager of HR at and which indicated that the beneficiary was employed as an I.T. analyst in the computer consultancy department from July 29, 2004 to October 16, 2010, at which time she resigned.

The information provided in the employment statements contradict each other and conflict with the beneficiary's statements on the ETA Form 9089. The job duties, job titles, and periods of time during which the beneficiary was employed by changed from one statement to the next. Crucially, the beneficiary is not credibly described as being an I.T. analyst for five progressive years following her receipt of her bachelor's degree in April 2004. In addition, there has been no plausible explanation given for the blatant inconsistencies and contradictions contained in the statements made by and . The regulation at 8 C.F.R. § 103.2(b)(2) provides:

> *Submitting secondary evidence and affidavits. (i) General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

See also 8 C.F.R. § 204.5(g)(1) (Other documentation relating to experience will be considered if the required letters are unavailable).

The petitioner fails to overcome the unavailability of both primary and secondary evidence. The affidavits are not the best evidence. Counsel's statement with regards to the affidavits submitted is not persuasive. There has been no documentation submitted to substantiate counsel's claim with regard to the beneficiary being unable to obtain official documentation from her former employer . In fact, the employment letter dated June 4, 2009 was provided by an HR division of that company. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The statement submitted on appeal directly contradicts the employment

letter issued by and dated June 4, 2009 which describes the beneficiary as an "assistant systems engineer," not an I.T. analyst. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). Because of these unexplained inconsistencies and multiple contradictions, the AAO does not accept the employment statements as evidence of the beneficiary's five years of progressive employment.

Moreover, the description of the beneficiary's work experience in the affidavits is repetitive and fails to establish that she has the required work experience in the job offered. 8 C.F.R § 204.5(g)(1). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is March 29, 2011. *See Matter of Wing's Tea House*, 16 I&N Dec. 158. There has been no plausible explanation given for the multiple inconsistencies and contradictions found in the record pertaining to the beneficiary's alleged employment with

Accordingly, it has not been established that the beneficiary has the requisite five (5) years of progressive post-baccalaureate experience or that she is qualified to perform the duties of the proffered position. 8 C.F.R § 204.5(g)(1).

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[1] If the petitioner's net income or net current assets is

[1] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F.

not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm'r 1967).

In the instant case, the proffered wage is $104,458.00 per year and the priority date is March 29, 2011. The petitioner submitted a copy of pay stubs issued by the petitioner to the beneficiary with pay dates of June 28, 2011 and July 12, 2011 only. The petitioner did not submit its corporate tax return for 2011. The petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite any shortfalls in wages paid to the beneficiary, net income and net current assets.

Accordingly, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

Supp. 2d 873 (E.D. Mich. 2010), *aff'd,* No. 10-1517 (6th Cir. filed Nov. 10, 2011).